U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)

Issue Date: 15 September 2004

Case No.: 2000-LHC-01743

OWCP No.: 5–38821

BRB No.: 03–0448

In the Matter of

WILLARD L. PARKER,
Claimant,

v.

MOON ENGINEERING,
Employer,
and

VIRGINIA PROPERTY AND
CASUALTY GUARANTEE
ASSOCIATION,
Carrier.

Appearances:

John H. Klein, Esq.,
For the Claimant

F. Nash Bilisoly, Esq.,
For the Employer/Carrier

BEFORE: Richard K. Malamphy
Administrative Law Judge

DECISION AND ORDER ON REMAND ASSIGNING RESPONSIBILITY FOR PAYMENT

This proceeding arises from a claim filed under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901 et seq.

A formal hearing was held in Newport News, Virginia, on March 27, 2002, at which time all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations. In a Decision and Order issued on February 26, 2003, the

undersigned Administrative Law Judge granted authorization for the Employer to pay for a left knee replacement. The Employer appealed, and in a decision issued on March 17, 2004, the Benefits Review Board remanded this case, instructing the Administrative Law Judge to "consider and discuss all of the medical evidence relevant to this issue and evaluate it in light of the applicable legal standards." Parker v. Moon Engineering, Inc., BRB No. 03-0448 at 6 (March 17, 2004) (Unpublished).

In an order dated July 16, 2004, the undersigned directed the parties to submit briefs on the outstanding issues.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

I. Preliminary Matters[1]

At the hearing, CX 1 – 9 and EX 1 – 5 were entered into the record, and permission was granted to depose Dr. Cohn and Dr. Seitz.

II. Stipulations

The parties have stipulated to the following facts:

1. That the parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act;

2. An Employer/Employee relationship existed at all relevant times;

3. That on November 29, 1981, the claimant suffered a work-related injury to his left knee;
4. That a timely report of injury was given to the employer;

5. That the Employer paid Mr. Parker temporary total disability benefits from November 30, 1981, to January 12, 1982; from January 15, 1982, to January 18, 1982; from February 1, 1982, to February 7, 1982; April 14, 1982, to April 15, 1982; April 20, 1982, to April 21, 1982; June 28, 1982, to July 25, 1982;

6. That Claimant was paid a 10-percent permanent partial disability to the left lower extremity;

[1] *The following abbreviations will be used as citations to the record:*

JS - *Joint Stipulations;*
TR - *Transcript of the Hearing*
CX - *Claimant's Exhibits; and*
EX - *Employer's Exhibits.*

7. That a timely notice of controversion was given.

III. Issue

1. Whether a review of all of the medical evidence supports a finding that the need for a left knee replacement arose on account of the Claimant's 1981 injury.

IV. Contentions

A. Claimant's Contentions

On remand, the Claimant's counsel emphasized Dr. Cohn's testimony, "where he also concluded that Mr. Parker's 1981 injury was much more traumatic than his 1994 injury and that the 1981 injury hastened Mr. Parker's degenerative process." Claimant's Brief on Remand at 1. Furthermore, Claimant added, Dr. Seitz, who examined Claimant at the Department of Labor's request, testified, "There's no question that the primary cause of his knee problem was the injury of 1981." Deposition of Dr. Seitz at 15.

Claimant's counsel concludes: "based upon both Drs. Cohn and Seitz's opinion on fact remains true: the 1981 injury not the 1994 injury is the cause of Mr. Parker's current condition, thus making Moon Engineering the responsible employer." Claimant's Brief on Remand at 2.

B. Employer's Contentions

The employer, on the other hand, concludes that both Dr. Seitz and Dr. Cohn "specifically testified that the 1994 Metro injury **accelerated the need for the total knee replacement**." Employer's Brief on Remand at 14 (emphasis in original). Additionally, Employer argues that its position "is supported by the chronology of Claimant's treatment." Id. Specifically, Employer stresses Claimant's inability to return to regular work after the 1994 injury as contrasted with the Claimant's ability to work for the ten years preceding the 1994 injury. Id.

V. Facts

The Claimant, Willard Parker, first began working for Moon Engineering in 1966 as a boilermaker – an occupation that requires rigorous physical activity including climbing on and off scaffolds and ladders and crawling inside of and underneath boilers. TR at 10. On November 29, 1981, Claimant injured his left knee. He received medical treatment, including surgery for that injury, and was unable to work for two or three months. Tr. at 11, 17. Following his recovery from that injury, Claimant worked for Moon Engineering until he was laid off in 1990. TR at 12, 17.

In 1992, Claimant began working for Metro Machine as a boilermaker. TR at 12. At that time, Claimant was able to complete his work without difficulty from his knee. Id. While he was working at Metro, Claimant sustained another injury to his left knee which necessitated another course of medical treatment. TR at 12. Following an arthroscopic surgery on his left

knee, Claimant returned to work full time at Metro, but was no longer able to work as a boilermaker. TR at 12 – 13. Instead, he worked inside the boiler shop since his treating physician had permanently restricted him from climbing ladders. TR at 14, 19.

Shortly after this time, Claimant's treating physician, Dr. Cohn, referred Claimant to his partner, Dr. Wagner. Both Dr. Wagner and Dr. Cohn agreed that Claimant needed a knee replacement surgery. TR at 14-15. Claimant was also referred to Dr. Seitz by the Labor Board for evaluation and to Dr. Blasdell by his employer, Metro Machine. TR at 15 – 16. Metro Machine refused to pay for the knee replacement surgery. TR at 15.

Claimant testified that, for the most part, he had not required medical treatment for his knee from 1984 – 1994, although he had had some intermittent problems with the knee. TR at 17-18; See also Deposition of Dr. Cohn at 5. Claimant ceased working at Metro Machine in 1998.

After leaving Metro Machine, Claimant entered into a settlement agreement with Metro concerning, inter alia, the 1994 injury to his knee. TR at 20. The settlement agreement, executed pursuant to 33 U.S.C. § 908 (i), included entitlement to continuing disability and medical benefits for the 1994 injury. TR at 21; See also EX 6. Claimant received a settlement of $100,000, exclusive of attorney fees. TR at 21.

VI. Discussion

The application of the "aggravation rule" is well settled in cases involving multiple traumatic injuries. See, e.g., Foundation Constructors, Inc. v. Director, OWCP, 950 F.2d 621 (9th Cir. 1991); Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Buchanan v. International Transportation Services, 33 BRSB 32 (1999); Kooley v. Marine Industries Northwest, 22 BRBS 142 (1989); Adam v. Nicholson Terminal & Dry Dock Co., 14 BRBS 735 (1981).

When the "existence of work related injuries with more than one covered employer is established," the Board recently stated, "the inquiry is whether the claimant's disability is due to the natural progression of the first injury or is due instead to the aggravating or accelerating effects of the second injury." Buchanan, 33 BRSB at 35. Thus, "[t]he key under this formulation is determining which injury ultimately resulted in the claimant's disability." Kelaita, 799 F.2d at 1311. That determination will decide which employer is liable for the Claimant's resulting disability. As the Ninth Circuit stated in Kelaita:

> If the disability is the result of the natural progression of the first injury, then the carrier at risk at the time of the first injury is liable. If, however, the disability is the result of the second injury, then the carrier at risk at the time of the second injury is liable for the totality of the disability resulting therefrom.

Kelaita, 799 F.2d at 1311, citing Crawford v. Equitable Shipyards, Inc., 11 BRBS 646, 649-50 (1979), aff'd sub nom. Employers National Ins. Co. v. Equitable Shipyards, 640 F.2d 383 (5th Cir. 1981).

In making this determination, the Administrative Law Judge must "wei[gh] the evidence of the record." Buchanan, 33 BRSB at 35. "[T]he factfinder is entitled to weigh the medical evidence and to draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner." Todd Shipyards Corp. v. Donovan, 300 F.2d 741 (5th Cir. 1962).

Additionally, "each employer bears the burden of persuading the factfinder, by a preponderance of the evidence, that claimant's disability is due to the injury with the other employer." Buchanan, 33 BRSB at 35-36, citing Kelaita, 799 F.2d at 1312 ; see also Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 28 BRBS 43 (CRT) (1994) (stating that the preponderance of the evidence standard does no more than require that the proponent present a more persuasive case than its opponent).

Therefore, the first employer "need only establish that the injury that the claimant sustained in [the second employer's] employ aggravated, accelerated or combined with claimant's prior injury to result in claimant's disability" to avoid responsibility for payment. Buchanan, 33 BRSB at 36.

A. Dr. Ira Cantin

Dr. Ira Cantin treated Claimant for the original 1981 injury to his left knee. TR at 11. On April 25, 1982, Claimant underwent an arthrotomy to correct a bucket handle tear of the lateral meniscus. EX 1 at 11. Following that surgery, Claimant reached maximum medical improvement with a ten percent permanent partial disability of the left leg. EX 1 at 16. Claimant saw Dr. Cantin several times for treatment of pain and other symptoms related to the knee; on February 28, 1984, Dr. Cantin stated: "I would expect that he [Claimant] will have occasional pains and that is the reason for his disability. I do not think any treatment or anything else is indicated at this time." EX 1 at 19.

B. Dr. Sheldon L. Cohn

Dr. Cohn treated Claimant for the 1994 injury to his knee. TR at 13. Dr. Cohn reported on February 21, 1995 that the 1994 "twisting injury" to Claimant's knee "exacerbated his arthritic condition of his knee and caused a chondral lesion or a medial meniscus tear. This has remained symptomatic for him . . . ." EX 4 at 4. At his deposition, Dr. Cohn further explained:

> I thought he had posttraumantic and degenerative arthritis of the knee. My impression was that he had had a work-related injury in May of 1994 which had exacerbated his condition and may have caused a medial cartilage tear. I recommended that he have an arthroscopic procedure to try and treat his knee.

Deposition of Dr. Cohn at 8.

On February 27, 1995, Claimant underwent an arthroscopic partial lateral meniscectomy of his left knee – a procedure in which the torn portion of Claimant's knee cartilage was removed to alleviate the irritation it caused. Deposition of Dr. Cohn at 9 – 11. Dr. Cohn testified that this

injured cartilage was the same cartilage that had been the subject of the 1982 arthrotomy. Deposition of Dr. Cohn at 9. Following this surgery, Claimant had "very little, if any, functional cartilage" in his left knee. Id. at 10.

Claimant recovered well from the 1995 surgery but "continued to have intermittent and then progressively more severe symptoms in his knee over the next few years." Id. at 12. Despite various means of medical treatment, Claimant's knee continued to degenerate; by late 1996 Dr. Cohn felt that Claimant was "a candidate for a total knee replacement." Id. at 12.

When asked whether the 1994 injury and subsequent surgery contributed to Claimant's need for a total knee replacement, Dr. Cohn responded in the affirmative. He explained:

> [W]hen he [Claimant] came to see me, he already had significant arthritis in his knee, but he related a twisting type traumatic injury. I believe he was seen in an urgent care at that time. And my impression was that he had torn more of his lateral meniscus and the lateral cushion in his knee and may have caused more injury to the smooth surface of his knee, and I feel that would cause whatever arthritis he already has to progress at a faster rate and may indeed have caused some arthritis on its own.

Id. at 13.

Dr. Cohn further testified that, while the 1981 injury was the "major factor" in causing Claimant's knee problems, including portions of the joint that were completely without functional cartilage, the 1994 injury caused the degeneration of Claimant's knee "to progress at a faster rate." Id. at 15-16.

C. Dr. Donald G. Seitz

Dr. Donald G. Seitz, an orthopaedic surgeon, saw Claimant one time for an independent medical examination. Deposition of Dr. Seitz at 5 – 6. After reviewing Claimant's medical history and examining Claimant, Dr. Seitz stated that Claimant's "symptoms were primarily related to his injury back in 1982. . . . . And I did not believe that the injury of May of 1994 was a significant factor in his degenerative joint disease." Id. at 7 - 8. Furthermore, Dr. Seitz testified that "the knee itself was more vulnerable to injury as a result of" the 1981 injury. Id. at 16.

However, Dr. Seitz also acknowledged that Claimant "went on for ten years really without any difficulty, until May 6th of 1994 when he again twisted his knee." Id. at 15. Dr. Seitz continued: "during those next several months he was seen on four different occasions for that knee. So I've got to say that – I've got to feel that it contributed, to some degree, to his problem. And probably necessitated the knee replacement being done earlier than it would otherwise have been done." Id. at 15.

D. Dr. Steven Blasdell

Metro Machine referred Claimant to Dr. Steven Blasdell regarding his 1994 injury. Claimant's Brief at 16; TR at 16. Dr. Blasdell opined in his April 3, 1997 report that Claimant's "later [after the 1994 injury] ongoing pains are most likely related to his underlying lateral compartment osteoarthritis which is secondary to his open lateral meniscectomy performed April 26, 1982, by Dr. Cantin." CX 8 at 3. Dr. Blasdell continued: "His arthroscopy and partial lateral meniscectomy performed on February 27, 1995 was also related to his underlying degenerative arthritis and not due to the May 6, 1994, work episode, within a reasonable degree of medical certainty." Id. Dr. Blasdell recommended delaying knee replacement surgery as long as possible because of Claimant's diabetes. Id.

E. Evaluation of Evidence

In its decision, the Benefits Review Board directed the undersigned Administrative Law Judge to "address the testimony by Drs. Cohn and Seitz that the 1994 injury accelerated his need for a total knee replacement." Parker v. Moon Engineering, Inc., BRB No. 03-0448 at 5 (March 17, 2004) (Unpublished). Upon extensive review of the medical evidence and the applicable case law governing this issue, this Court finds that, while the 1981 injury at Moon was the primary cause of Claimant's disability, the 1994 injury at Metro Machine acted to accelerate Claimant's injury. Thus, this Court is persuaded that Claimant needed knee replacement surgery sooner than he would have absent the 1994 injury.

This finding is predicated upon the medical testimony of Dr. Cohn, the Claimant's treating physician, and Dr. Seitz, the physician to whom Claimant was referred by the Department of Labor as well as the application of the case law cited previously.

While Claimant's attorney made a persuasive argument, the legal issue in cases of multiple traumatic injuries under the LHWCA is not the determination of the primary cause of injury; rather, our case law focuses on determining whether the second injury "aggravates, accelerates, or combines with claimant's prior injury" to result in the Claimant's disability. Buchanan v. Int'l Transp. Services, 33 BRBS 35 (1999). If there were aggravation, acceleration, or combination, the second employer -- here, Metro Machine -- is liable for the entire disability. Id.

In this case, Dr. Cohn, as treating physician, is most familiar with the patient and his symptoms. Dr. Cohn stated in his testimony that Claimant's second injury caused Claimant's arthritis to "progress at a faster rate." Deposition of Dr. Cohn at 13. This is clear evidence of acceleration.

Furthermore, Dr. Seitz, while acknowledging that the 1994 injury was "not a significant factor in his degenerative joint disease," stated that the 1994 injury "probably necessitated the knee replacement being done earlier than it would otherwise have been done." Deposition of Dr. Seitz at 15. Again, this is clear evidence of acceleration.

Finally, Claimant's medical and employment history support this finding as well: Dr. Seitz testified that Claimant "was seen on four different occasions for that knee" in the several months

following the 1994 injury. Deposition of Dr. Seitz at 15. The Claimant testified that he had, except for three occasions in 1990, not sought medical treatment for his knee from 1984 through 1994. TR at 18. Additionally, Claimant testified that he was still able to work as a boilermaker following his 1982 surgery, and did so for several years. TR at 12. In contrast, Claimant was not able to work in such a physically demanding position following the 1994 injury. TR at 18-19.

Dr. Blasdell's 1997 report which was entered into the record in this case indicates that the 1994 injury was not serious and essentially had no effect on Claimant's condition. This Court is mindful that Dr. Blasdell was hired by Metro Machine prior to Claimant's settlement with them; furthermore, Dr. Blasdell's report is inconsistent with the evidence given by Dr. Cohn and Dr. Seitz as well as Claimant's medical and employment history.

While this Court is aware that Claimant's Section 908 (i) settlement with Metro Machine cuts off further medical benefits for Claimant's total knee replacement, Moon Engineering has met its legal burden of showing that the 1994 injury accelerated the degeneration of Claimant's knee. Thus, Metro Machine is the responsible employer..

VII. Order

1. Moon Engineering is not responsible for medical expenses related to the Claimant's left knee impairment from May 6, 1994 and continuing.

A

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/vlj
Newport News, Virginia